Insight

Proposed Antitrust Legislation Would Be A Radical Departure

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As part of their "Better Deal" platform, in 2017 Senate Democrats introduced two bills to reform antitrust laws, S. 1811 and S. 1812. These bills would be a substantial departure from the current antitrust regime, and are needed, according to supporters, to promote competition by discouraging mergers. But is there sufficient evidence that these laws would improve consumer protections? Or would they simply add another layer of costly regulations?

The Merger Enforcement Improvement Act, S. 1811, makes changes to merger enforcement. The bill adjusts premerger notification filing fees, which are fees paid to the Federal Trade Commission (FTC) when an acquiring company files for a merger. For smaller deals, the fees decrease an average of 21.3 percent when the "aggregate of the voting securities and assets of the acquired person" is under $1 billion. For mergers that are above $1 billion in aggregate, the bill increases filing fees significantly, from 42 percent to over 700 percent of the current baseline, making it more expensive to even start a merger. This bill would also set these fees to rise annually with the Producer Price Index.

In addition, the Merger Enforcement Improvement Act would require companies that agree to a settlement with the FTC or the Department of Justice (DoJ) to submit data on an annual basis for five years following the agreement. This data would describe the competitive impact of the deal, specifically focusing on "the pricing, availability, and quality of any product or service," as well as consumer benefits. This aspect of the proposal places the responsibility on companies to prove the success of the settlement.

Finally, the Merger Enforcement Improvement Act commissions two studies: It tasks the FTC to conduct a study on institutional investors and their control in concentrated markets, and likewise tasks the Comptroller General of the Government Accountability Office to conduct a study on the success of merger remedies and the impact of mergers on the economy. Additionally, the budgets of the FTC and the Antitrust Division of the DoJ are increased by 9.5 percent and 9.2 percent, respectively.

The Consolidation Prevention and Competition Promotion Act of 2017, S. 1812, removes the requirement that a merger must "substantially" lessen competition for it to be blocked by the FTC. The bill substitutes "substantially" with "materially," and states that a merger may be blocked if it causes "more than a de minimis amount of harm to competition." In other words, this change removes the need for the merger to be significantly harmful to competition; even a small reduction to market competition could block a merger from taking place.

In addition, the Consolidation Prevention and Competition Promotion Act would add the term "monopsonies" to the Clayton Act, stating that both monopsonies and monopolies are illegal. While monopolies control the supply in a market, monopsonies exist when there is only one buyer of labor or a product. Much like its companion legislation, this bill includes a similar provision regarding post-settlement data. Furthermore, the Consolidation Prevention and Competition Promotion Act would create the Office of the Competition Advocate within the FTC. The Office of the Competition Advocate would advise both the FTC and the Antitrust Division of the DoJ on antitrust investigations and consumer complaints, and would help consumers and small businesses

with complaints. It would also collect data and publish reports on market concentration and the success of merger remedies.

Both bills are in the early stages; neither has been taken up by the Committee on the Judiciary, and neither has secured any Republican co-sponsors. Nevertheless, supporters defend the bills in stark terms: Massachusetts Senator Ed Markey described his support for the Consolidation Prevention and Competition Promotion Act by stating, "consumers today need more choice and competition, not more consolidation of colossal companies. This bill helps protect the public from harmful mergers by better evaluating the effects these deals will have on competition and prices."

The framing of these bills is a sleight of hand; antitrust has long been focused on price and competition. Retrospective reviews of antitrust tend to paint a more muddled picture of outcomes than what Markey and others suggest. As economist Paul Rubin noted, when describing a survey of economists about past antitrust suits, "The view of the economists in the sample is that there are slightly more justified than unjustified cases, although in 40 percent of the cases there is no anticompetitive behavior and the case is unjustified." By changing the standards and raising the threshold, more false positives would be included. The actual effects of these bills wouldn't be better evaluation of deals, as Markey has framed it. Rather, they would simply set a much higher threshold for mergers to pass.

Still, that doesn't target the actual problem in antitrust, which is effective policy. Recently, an attorney rightly noted that the two bills would "fundamentally change the way antitrust laws operate." Indeed, these bills would flip the order that good legislation typically follows in its creation. Instead of first establishing the appropriateness of stronger antitrust rules by asking the FTC to study the current policies and report back to Congress, the bills would legislate first and ask the agencies to review the new laws later.

Raising the threshold for mergers, as these bills would do, is unlikely to improve consumer protections, but threatens to exacerbate the problems with the current system. Given that some 40 percent of cases are unjustified, according to Rubin, policymakers should first look to achieve more effective policy, not merely more expansive policy.